Alandco Development Corp. d/b/a/ Senior Care at the Fountains *and* United Food and Commercial Workers Union, Local 56, AFL–CIO. Cases 4–CA–31269, 4–CA–31502, and 4–RC–20185

May 25, 2004

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On November 21, 2003, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alandco Development Corp. d/b/a/ Senior Care at the Fountains, Pennsauken, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Delete paragraphs 1(a) and 1(c), and reletter the remaining paragraphs accordingly

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election held in Case 4–RC–20185 is set aside and that the case is remanded to the Regional Director for Region 4 to conduct a new election when the Regional Director deems that the circumstances permit the free choice of a bargaining representative.

DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers, Local 56, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent unlawfully scrutinized the work of Juanita Joyce, discharged her, and threatened to fire union supporters 10 days after the election.

[2] The judge found that the Respondent violated Sec. 8(a)(1) when, in a single course of conduct, Administrator Jack Wiener shook an employee's car while she and another employee were sitting in it, directed vulgar remarks at the two employees, and then, according to the judge, interrogated them. We find it unnecessary, on the facts presented, to determine whether the Respondent committed three separate violations, as found by the judge. Instead, we simply find that the Respondent's conduct was coercive and therefore violated Sec. 8(a)(1). We shall modify the judge's recommended Order accordingly.

Chairman Battista agrees with the judge that the statement made by Respondent's former food service director, Robert Mitchell, to certain employee supporters of the Union, that Administrator Wiener was looking for ways to get rid of union activists, constituted a threat of termination in violation of Sec. 8(a)(1). Accordingly, Chairman Battista finds it unnecessary to pass on the judge's additional finding that the statement of former food service director, Jeff Fisher, to employees similarly violated Sec. 8(a)(1). The latter violation would be cumulative and does not affect the remedy.

For the same reason, Chairman Battista finds it unnecessary to pass on the judge's finding that the song which Health Care Services Director Gossner admitted singing to employees violated Sec. 8(a)(1). Chairman Battista agrees with the judge that a different version of the song, as described by employee Jackson, constituted a threat of termination, violating Sec. 8(a)(1).

used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election.

No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. May 25, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT question our employees about their union activities.

WE WILL NOT tell our employees that we will fire them if they vote for the Union.

WE WILL NOT restrict our employees from entering our facility more than 10 minutes before their scheduled starting time because they support the Union.

WE WILL NOT tell our employees that we want to terminate them because they support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ALANDCO DEVELOPMENT CORP. D/B/A/ SENIOR CARE AT THE FOUNTAINS

Donna D. Brown, Esq., for the General Counsel.
Richard W. Gleeson, Esq. (Gleeson & Corcoran), of Boston, Massachusetts, for the Respondent.
Laurence M. Goodman, Esq. (Willig, Williams & Davidson), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On April 15, 2002,[1] Respondent Alandco Development Corp. d/b/a Senior Care at the Fountains terminated certified home health aide (CHHA) and certified medication assistant (med tech) Juanita Joyce. The complaint in Case 4–CA–31269 alleges that it did so in violation of Section 8(a)(3) of the Act because she was an active supporter of the United Food & Commercial Workers Union, Local 56, AFL–CIO (Union). Respondent denies that it did so or in any other way violated the Act, as both complaints allege.[2]

Respondent is a New Jersey corporation engaged in the operation of an assisted living and residential care facility in Pennsauken, New Jersey. It has three units: residential, for alert patients; assisted living, for residents who need more care; and Safe Care, a locked dementia unit. During 2002, it received gross revenues in excess of $100,000 and purchased and received goods valued in excess of $5000 from points outside of New Jersey. I conclude that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

On April 4, 2001, the Union, which I conclude is a labor organization within the meaning of Section 2(5) of the Act, filed a petition in Case 4–RC–20185, which led to a Board-conducted representation election on May 18, 2001, in the following unit which is appropriate for bargaining:

> All full-time and regular part-time certified nursing assistants, non-certified nursing assistants, housekeeping employees, laundry employees, maintenance employees, porters, dietary aides, cooks, activity aides, beauticians, and receptionists, excluding all other employees, including registered nurses, licensed practical nurses, office clerical employees, temporary employees, guards and supervisors as defined in the Act.

[1] All dates are in 2002, unless otherwise indicated.

[2] The charge in Case 4–CA–31269 was filed on April 29 and amended on May 24. The complaint was issued on June 28. The charge in Case 4–CA–31502 was filed on August 8. The complaint was issued on December 27. This case was tried in Philadelphia, Pennsylvania, on July 29 and 30, 2003.

Thirty-three ballots were cast for the Union and 32 against, and there were 5 determinative challenges. In addition, the Union filed timely objections. On February 11, 2002, the Regional Director approved a stipulation entered into by the parties, in which they agreed that the May 18 election would be set aside and that a second election would be conducted on April 5. The Union lost, 40–32, but again filed objections, some of which are the subject of this proceeding.

The two allegations which comprise the second complaint (Case 4–CA–31502) allege that Jeffrey Fisher and Robert Mitchell, both Respondent's past food service directors, told employees that Respondent's administrator, Jack Wiener, wanted them to terminate employees who supported the Union. The employees' testimony did not precisely support those allegations. Instead, current employee Betty Frazier testified that, before the second election, in the spring of 2002, Fisher told her and her daughter, Shanna Brown, that he thought they were doing a good job and could not understand the reason that Wiener wanted them "out of the building so bad." Later, during late spring, after Mitchell had replaced Fisher, Mitchell told the same employees and two others who worked in the dietary department, Charlene Collins and Angie Lyons, the four being the only employees in the department who openly supported the Union and wore union buttons daily, that Wiener wanted them "gone" and that he wanted Mitchell to "[f]ind ways, a way of getting rid of us," "more than likely" because of their union affiliation. Brown somewhat corroborated the nature of Mitchell's threat when she testified to a conversation with Mitchell in or around June or July in Mitchell's office, where he told them that Wiener wanted the four employees gone. However, at that conversation, according to Brown, only she and her mother were present. In addition, Brown did not corroborate her mother at all regarding Fisher's threat.

Whatever these discrepancies and inconsistencies may be, Mitchell testified that Wiener told him at least twice that Wiener wanted Mitchell to get rid of the union supporters, and Mitchell, albeit at first denying that he told the employees "directly," later admitted that he told precisely that to Frazier. I recognize that Mitchell had been fired by Wiener, and probably had no great fondness for him. In fact, he filed an unfair labor practice against Respondent, although the record does not reveal the precise theory of the charge, which was withdrawn by him before the Regional Office made any decision regarding the validity of his claim. On the other hand, I find little reason that Mitchell should have misstated the facts at this late date; and I credit him and the employees and conclude that Wiener's statement constituted a coercive threat to terminate them because of their union activities, in violation of Section 8(a)(1) of the Act.

Although Fisher, Mitchell's immediate predecessor, denied the statement which had been attributed to him, it is so similar to what Mitchell told the employees that I find that Fisher made that statement, too, which had the same coercive and threatening effect, and that Frazier was telling the truth about the threat.[3] I conclude, therefore, that Respondent also violated Section 8(a)(1) of the Act regarding his statement. In doing so, I deny Respondent's motion made during the hearing to dismiss both allegations in that the charge did not encompass the activity, because the charge alleged that the activity occurred in July or August, rather than in the spring. Section 10(b) mandates only that a charge be filed before a complaint issues. It does not require that the charge be specific or that the charge and the subsequent complaint be identical. "The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading." *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943). I find that the mere incorrect dates of the incidents was insufficient to warrant a dismissal, especially because Respondent had been advised of and was able to fully litigate these issues.

On August 24, 2000, Wiener issued the following rule limiting employees' access to Respondent's premises:

> Unless you have prior approval from your Supervisor, all hourly employees may arrive at the facility no more than ten (10) minutes prior to the start of their scheduled shift. Anyone clocking in more than ten minutes early will not be compensated for that time. When your shift is over, you must clock out immediately and leave the premises within ten (10) minutes of your shift being over. During the time shifts are changing, employees finishing their shift and those arriving to begin their shift may not socialize with one another. In the case of extenuating circumstances (for example, awaiting transportation), you must inform your Supervisor of the situation.

Whether this rule was consistently enforced was the subject of one of the many allegations contained in the first complaint (Case 4–CA–31269). According to Juanita Joyce (Joyce) and her sister, Grace, when they returned to the facility on February 11, after having appeared at the Regional Office, where the stipulation to conduct a second election was agreed to, they went inside the facility to use the ladies' room, apparently earlier than the quoted rule allowed. Upon leaving, Wiener, perhaps Respondent's director of health care services, Sharon Gossner, too, was waiting for them and told them that they were not allowed in the building until 10 minutes before their shift. Current employee Jennifer Copeland testified that, in

[3] The facts in this proceeding were hotly contested. Almost without exception, all the allegations were denied. Witnesses viewed the same incidents from utterly different perspectives. Unfortunately, I was not satisfied with the testimony of many witnesses. In particular, Joyce was interested in salvaging her job; Wiener and Sharon Gossner were interested in ridding themselves of the Union. I have recited the facts which, after most careful consideration and deliberation, I find accurate. In making these and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses, the inherent probabilities in light of other events, corroboration or the lack of it, and the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony inconsistent with or in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Where necessary, however, I have set forth the precise reasons for my credibility resolutions. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

February, Gossner told her that she "must not be seen in the building before it's time to clock in." Although Copeland knew of the "10–minute" rule, which was included in her employee package when she started working for Respondent after the first election (Joyce testified that she never even knew of it), she testified that, before her oral instruction by Gossner, there were no limitations on what time she could enter the building or how long before it was time to clock in; and there were no limitations on where she could go inside the building before clocking in.

Respondent's position is that the rule was always in effect. The only exception was for employees who took the bus, or got a ride and had to be dropped off. They may enter the facility early and go to the breakroom, particularly during the cold winter months. However, I find no reason to discredit the employees' testimony, particularly Copeland, a current employee, and not even shown to be a union supporter.[4] Although her recall of the date of her conversation was not precise, it appears obvious that the change preceded the second election and, crediting the date testified by the sisters, was caused by the fact that there was to be a new election. Wiener thus wanted to separate the employees from Joyce, the Union's principal supporter and observer at both elections. (Wiener testified that he "knew that Juanita Joyce was a real strong mover and shaker and her sister was involved heavily.") I conclude that Respondent violated Section 8(a)(1) of the Act.[5] In so finding, I also credit Joyce's testimony that the February 2002 incident was not the first time that she and Grace were not allowed in the building. Prior to the first election, Wiener told them to leave the building and told them that they could not talk to people and could not sit in the lounge area, while Wiener permitted other employees to enter the facility more than 10 minutes before they started their shift. Wiener relaxed the enforcement of his restriction "right before" [I find that she misspoke and meant "after"] the first election, but reinstituted it immediately after the parties agreed to a second election.

Three of the unfair labor practice allegations stem from the same incident, when Joyce and her sister, Grace, were sitting in a car in Respondent's parking lot, waiting to go into the facility, because of Wiener's earlier unlawful prohibition from entering the facility earlier than 10 minutes before their starting time. Wiener admitted: "I kind of came up behind on the passenger side and pushed down on the bumper." He then went over to the front of the car, telling the sisters that it was "mighty funny" that he walked into his building that morning and found hundreds of different brightly-colored notes promoting the Union that had been taped all over Respondent's premises, predominantly in areas that the residents used, such as the smoking lounge, the penthouse, and the common area lavatories. (Wiener testified: "They had been taped all to mirrors, windows, common areas, resident areas; different parts of the building.") Some stated "Vote yes" and "Better benefits." Another stated: "Jack has a contract, shouldn't you?" He said: "Next they'll put out [one] that Jack has a 10 inch dick." He turned back to the facility, saying: "Let me get away from the car before I get a letter from the National Labor [Relations] Board"; and he turned, asking "Ladies, by the way, can I have a copy of my contract that I'm supposed to have?"

I conclude that Wiener violated Section 8(a)(1) as the complaint alleged. He was not sauntering through the parking lot because "[I]t was kind of like a beautiful spring day," as he implied. He was headed for the car in which sat the principal union organizer, Joyce, who was in the car waiting to enter the facility only because Wiener would not permit her to come in earlier. He was mad that the Union's propaganda had been placed all over his facility. He knew who was in the car, and it was no playful, funny act (Wiener said, like saying "Boo") that he shook the car by stepping on the bumper. He wanted to advise the employees that he was there and he was irate. He told them that the housekeeping department and maintenance staff "were in a really foul mood" because once again (this had been done twice before) they had to scrape tape off of everything. Despite the fact that Wiener may not have directly asked the sisters whether they had been responsible for the notes, a fact that they denied to him, he was clearly accusing them of so acting and looking for their response. Wiener appeared to justify his use of crude language by noting that in 2000 Joyce, after attending her bachelorette party, showed Wiener photographs of a nude male dancer with a large penis, and Joyce asked him how his sexual organ compared. But, with the union campaign, those days of mirth and cordiality had been replaced by the employees' struggle for self-representation, which Wiener wanted to defeat, to the extent of wanting to fire employees for supporting the Union, as found above.

Accordingly, in the context of what happened here, Wiener shook the car because it contained Joyce and her sister. His comments constituted interrogation. He knew that the sisters could not have posted the notes, because they were not permitted in the building. He was, however, looking for information from the leaders of the union drive about who the culprits were. Otherwise, there was no reason for his going to the car. In fact, the sisters denied any knowledge, demonstrating that they understood that Wiener was looking for a response. Respondent contends that the posting of the propaganda was unprotected, but it made no showing that it maintained any rule prohibiting their posting. Finally, his use of vulgarities was caused by his anger at these particular union activities, particularly the personal reference in one note that he had a contract. In this context, his vulgar and shocking comment was intended to coerce

[4] Grace testified that she and others picketed, identifying some of them, but not remembering others, and then added: "Jennifer walked up." Although she may have meant that Copeland joined the protest, the record does not sustain that finding; and there is nothing else in the record that proves Copeland's sympathies.

[5] I am aware of Joyce's testimony that, because the Union filed an unfair labor practice charge over this incident, Wiener then permitted Joyce and Grace to enter the facility more than 10 minutes before the start of their shift, but required them to remain in the employee lounge on the second floor of the building, and that this continued at least up to the day she was terminated. That cannot be. Joyce was fired on April 15. The Union's charge was filed on May 24. Although this reflects adversely on Joyce's credibility, Copeland's testimony is nonetheless compelling that a change was made. The Counsel for the General Counsel's motion to amend the complaint to also include the exclusion of Copeland is denied. The facts regarding her exclusion were not fully litigated.

the employees from distributing literature which he deemed offensive.[6]

The complaint alleges that Gossner threatened employees with loss of their jobs on numerous occasions, prior to the election, if they voted for the Union, and, after the election, because they supported the Union. The first alleged violation was based on a song or songs that Gossner sang often in the facility, overheard on April 4 by employee Jacqueline Jackson and in the presence of five to seven other employees: "If you vote for the Union, you wouldn't have a job on Monday" and said, but perhaps sang, something to the effect of "[I]f you vote for Local 56 you can go work at St. Mary's, because St. Mary's has Local 56." Wendy Wade, one of Respondent's witnesses, testified that Gossner sang or rhymed: "If you don't vote 'No' [either Rosewood or St. Mary's, she could not recall which] is the place to go." Gossner admitted only to singing, "happy and bubbly, like a joke but with a tune": "Vote NO, NO, NO or St. Mary's is the place to go." St. Mary's was a unionized facility and was raised as an issue during the campaign. What Gossner admitted to singing gave the employees the following alternative: either vote against the Union or work at St. Mary's. Thus, if an employee voted for the Union, the employee would work at the unionized facility, not at Respondent. That, I conclude, repeated, Gossner admitted, on about 50 occasions,[7] is a threat of termination, as the complaint alleges, in violation of Section 8(a)(1) of the Act. In addition, I credit Jackson's recollection of the more direct threat that the union supporters would not have a job on the Monday following the election. I find nothing humorous about either lyric.

The second alleged threat occurred, according to the General Counsel's witnesses, on April 8, the Monday after the Friday, April 5 election. As Joyce and Copeland were signing in across from Gossner's office, Gossner stated, according to Joyce: "[I have] to wait 10 days and [I'm] going to fire the Union people, and [I won't] have this f[uck]ing Union shit to deal with any more." In the office with Joyce were several employees including Nakima Dunlap, Wendy Wade, Tina Clary, Nicole Cadotto, and Bethzaida "India" Gulamo. Grace testified that she was with her sister and Copeland and that the same employees were in Gossner's office. Nicole was talking about a big lottery (Joyce confirmed that the employees were talking about a lottery when Gossner made her threat) and that the women were discussing what they would buy if they won and what positions they would hold at the facility. At some point, according to Grace, Gossner "came out and said that she, yes, because she can't wait until after, until 10 days after the election, because she's going to start firing people, and she won't have to worry about this F'ing Union anymore." Finally, Copeland testified that she was present with Joyce and Grace at the sign-in sheet and heard Gossner say, "I'm just giving them 10 days after and then I can start getting rid of whoever I want to get rid of." She heard no reference to the Union and no discussion of any lottery and recalled that there was only one person in the office with Gossner. Gossner and a number of other employees, one of whom was Gossner's assistant, denied that the threat was ever Before determining whether it was, I turn to Joyce's termination which, according to the complaint, was set up on April 15 by Respondent's subjecting her work performance to close scrutiny, in violation of Section 8(a)(1). On April 8, while Joyce was giving out medications, which was part of her duties, she observed that one of the residents spat out two pills in her hand and put them into her pocket. Joyce checked the resident's pockets and found a cupful of medication, which Joyce took to Wiener. He thanked her and told her that he would talk to Gossner about it the next day. On April 9, Joyce and Ereala Holliday, the CHHA and med tech who should have made sure that the resident took all her medication, were summoned to Gossner's office. Gossner counseled Holliday that she had to be more careful in ensuring that the resident actually took the medication (Respondent calls this "compliance").

The following day, Gossner happened to pass Holliday as she was giving out medications and noticed that she did not have the Medication Administration Record (MAR) in which aides were to record the medications that they were giving. Holliday claimed that she was ill and confused, as a result of which Gossner consulted with Wiener. They decided that they would call in Holliday and also check all their med techs to make sure they were doing everything properly; watching for compliance, and recording their medications. Apparently feeling that Holliday was not giving out her medications, Gossner marked the back of the blister packs[8] which contained the medications that Holliday was to give out the next night and determined that, although she signed out the medications, she did not give them. Gossner demoted Holliday from her position of med tech, who by state law is the only one who can give out medications in the assisted living and Safe Care sections of Respondent's facility, but she continued to work as a CHHA, supervising medications in the residential section of Respondent's facility. Respondent asked Joyce, who had previously been the med tech only on Sundays and Mondays, to become the med tech on weekdays in Holliday's place.

The review of all the aides, including Joyce, turned up no problems; but on April 16, Cadotto reported three medication errors committed by Joyce: giving medicine too early, not giving enough medicine, and failing to sign the MAR. That resulted in a meeting which Gossner held with Joyce at which Wiener was also present and the alleged errors were discussed. Joyce agreed that she had failed to sign the MAR and was permitted to sign the sheet after the fact, as was the normal, usual

[6] Joyce complained in writing to Respondent about Wiener's statement, and Respondent's higher officials apologized for Wiener's conduct, as did Wiener a few days later. Joyce's complaint, contrary to her testimony, was not composed and written by her. The language used is dissimilar from her use of language, as demonstrated by a quotation which appears later in this decision. In addition, I note her untruthful denial that she had ever engaged in sexual banter or kidding with Wiener. Although she was called as a rebuttal witness, she did not deny Wiener's credible and detailed discussion surrounding the photographs.

[7] Counsel for the General Counsel's motion to amend the complaint to add this increased number is granted. The allegation was fully litigated, and it was Gossner who admitted singing her song this many times.

[8] A blister pack is a stiff card on which are contained as many as 31 numbered, separate bubbles, each containing a pill which can be pushed out.

way to resolve that kind of problem. She disputed the fact that she had given one medication too early, insisting that what was, not without justification, read by Gossner and Wiener as a "3" was actually a "5,"[9] and contended that she in fact gave four pills, not one, to another patient. Respondent did not give Joyce any discipline. Wiener specifically stated that these were not "med errors," a more serious offense, but Gossner counseled her to "be more careful," being convinced that Joyce gave one patient too little medication because of the date that the blister pack indicated that the medications were started. Joyce was displeased, however, with Gossner's opinion, thinking that Gossner specially marked the blister pack to frame Joyce. She left to obtain proof and did so, finding that there were actually two blister packs for the same patient, thus disproving Gossner's contention. Just at the moment that she returned, she heard, she testified, Wiener say to Gossner, "I want to know every medication error that [she] makes and that's how we'll get her the hell out of here."[10] Joyce nonetheless entered Gossner's office and confronted her with the two blister packs. Gossner shrugged them off, saying that she was not going to debate Joyce.

Joyce and her sister could not agree on what happened the following day, April 17. Joyce testified that she rethought her working relationship with Respondent and asked Wiener whether there was any way that she could still work at Respondent giving patient care, without giving out medication. Wiener replied that there was. She then stated that she would not give medication and would give back the 50 cent raise that he had given her for giving out medications. She then went back to work and worked with no problem that night. She did her patient care and did not give out medications. Wiener, however, paged her back to the conference room and said that he needed a statement from her in writing to the effect that she resigned as a med tech effective immediately. Joyce said that she would not write that because she was not resigning. She reminded Wiener that she had previously asked whether she could continue to do her patient care without giving out medications.

Joyce testified that she was upset and said that she would write up the paper and bring it back to him the following day. Wiener insisted that she could not do that: she would have to clock out and go home and could not return to work until he had it. Joyce was crying and said that she would clock out, but Wiener changed his mind and said that, because Joyce was present with her sister, she could just write out a brief statement and give it to him, as he needed it for Respondent. She did so and went back to work. The following day, she was again paged to Wiener's office. Again, her sister was present. Wiener explained that Respondent "had some kind of budget thing" and that it no longer need a CHHA, but needed a certified med tech. Joyce protested that that was not what Wiener had said the day before, that he said that Joyce could do only patient care without giving out medications. Wiener insisted that it was not he who had made the decision; "this is the company." Joyce countered by saying that that was "a bunch of bull"; that he was getting rid of me "because of my Union activities"; and "I was not jeopardizing my license to give out medication in this building when anybody has access to the keys, anybody can go on that cart and do whatever."

Grace's recollections are quite at odds with her sister's. Grace was not present on April 16, but was the following day. Wiener told Joyce then that she had refused to give out medications, and Joyce denied it, saying that she just did not feel as though that she should give medicine in the facility anymore because she had been targeted for her Union activities. When Wiener said that he needed her position in writing, Joyce said that she would give him something the following day; but Wiener said: "[Y]ou write it now or you clock out and leave my building." So she wrote it. The following day, Wiener again paged Joyce to a meeting, at which he told her that he wished that she would have never written the letter and wished that she would reconsider giving medications in the facility. Again, Joyce said: "This is how I feel, and I feel as though that you all are targeting me because of my Union activities, and Sharon's going behind, marking the med carts and insulin . . . ." Wiener said that he would have to let her go because he had no openings for a CHHA or nursing assistant. According to Grace:

> He has opening[s] as a Med Tech. And that when he has an opening, that he will call her back for her job.
>
> And she asked him why. She said, I was hired as a Home Health Aide. And he said, like I said, we have to let you go. He said, out of courtesy of the company, we will allow you to work today, but . . . [a]fter all of that happened, we went out, we went back to Assisted Living and he followed us back to Assisted Living and told her she had to immediately leave his building, he is not tolerating this.

Joyce's testimony attempts to establish, among other contentions, that it was never her intention to resign. Instead, she wanted to continue working for Respondent, albeit on her own terms; and Wiener specifically agreed. Furthermore, even though there might have been no openings for the work that she wanted to perform as of the time that she was forced to leave, openings did occur; and she should have been hired to fill them. However, Grace's testimony is not in harmony with this theory. In particular, Grace did not corroborate Joyce's testimony about Wiener's asking for her resignation, and her refusal, nor did Grace testify about Wiener's agreement that Joyce could remain as an employee, without giving out medications, nor did Grace corroborate Joyce's lengthy explanation of Respondent's change of policy. By consequence, although I believe that Joyce truly felt threatened, I do not credit much of Joyce's testimony and find the following facts:

On April 17, she told Wiener and Gossner that she believed that she was being set up because she had heard from Grace that Gossner was going to start firing people in 10 days. As a

[9] The General Counsel's brief makes the excellent point that: "While one could mistake Juanita's '5' for a '3,' Respondent apparently ignored the fact that Juanita's shift didn't start until 3:30 p.m. and she was not allowed in the building more than 10 minutes before her shift."

[10] This statement did not include a specific reference to Joyce by name and is consistent with her investigatory affidavit that Wiener's only reference was to "she," not "Ms. Joyce," as Joyce later testified. In addition, Wiener never even referred to her as "Ms. Joyce"; he usually called her "JJ."

result, she determined that she would no longer give out medications.[11] When asked to put that in writing, she wrote:

> I Juanita Joyce will not give out any meds in this building thats AL/SafeCare and Residential. I fill like I'm being target because of my union actives and I refused to take that harassment here. And you can have your 50¢ back for being a Med Aide. Effectively immediatel[.]

According to Grace, Wiener "sat [Joyce] down and he told her that he wished that she would've never wrote this letter. He wished that she would consider doing, giving meds in the facility." She rejected his entreaties, even to the extent of refusing to give out medications that evening, despite the fact that her shift had already started and there was no one to give out medications. Respondent had to call back another employee, on overtime, to give out medications, while permitting Joyce to work her shift, performing all her duties but the giving out of medications. The next day, Wiener told Joyce that, if she was refusing to give out medications anywhere in the building, he did not have a job for her. She still refused, insisting that: "You hired me as a nursing assistant so you can't let me go, I want to be a nursing assistant." Wiener replied: "We don't have any openings for people that won't give any meds in the building, you have to give out medication." At no time did Wiener indicate that she could remain as an employee, even as a certified home health aide, if she did not give out medications, which is a critical part of every nurse's aide's duties, whether a med tech or not. In fact, it is not the techs, but nurses' aides, and only nurses' aides, who give out medications in the residential section, which comprises over 60 percent of the facility's beds. There are no med techs even scheduled for the residential section. In fact, the "distribution of Resident medications" is the first duty listed in the nurse's aide job description.

The final contention made by the General Counsel is that Joyce never removed herself from consideration as a CHHA, that that is what she wanted to do, and that that is what Wiener agreed she could do in the absence of giving out medications. Gossner put short shrift to that:

> Q. So the certified home health aides who work on those units [assisted living and Safe Care] do not give out meds?
>
> A. If they're scheduled in that unit they do not give out medications. If they're scheduled in Residential they do. They have to be able to float around and do the job in the whole building.

Wiener also credibly explained:

> At one time before we opened up Assisted Living and we only had Residential we had some people who were called "Bath Aides." Bath aides were people who would assist with activities of daily living but did not handle medications.
>
> At this point in time everyone in the building is cross-trained to supervise medications because it's the number [one] thing that we do in our entire community, supervise or administer medications.

In sum, Joyce refused to perform an integral part of the duties required of all the aides. She was given two chances to change her mind, but stubbornly refused. I suspect that Wiener promised to recall her if he had something for her, but that was a meaningless promise, made just to rid himself of her. He would never have anything. He specifically warned that he had no job for her if she refused to give out medications. Joyce's attempt during rebuttal to explain a distinction between giving out medications and "assist[ing] in administering medication" in the residential area was unavailing. She knew what Respondent expected from her, and she made clear that she would not give out medications in any part of the facility.

There is sufficient here to conclude that the General Counsel has made a prima facie case of 8(a)(3) discrimination under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Joyce was clearly engaged in union activity, Respondent had knowledge of that activity, and Respondent was hostile toward the unionization of its employees. Wiener was so hostile that he wanted four employees in the dietary department terminated; and I have no doubt that he wished the Joyce would leave, too. But I find no proof that Respondent discharged Joyce for any reasons that violated the Act. Furthermore, Board law holds that, even if Respondent discharged for reasons that violated the Act, if it showed that he would have taken the same action even in the absence of union activities, it would escape liability. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Here, Respondent offered a credible reason for her termination. It could not retain an employee who insisted that she would not perform an integral part of her job. I conclude that Respondent did not violate Section 8(a)(3) and dismiss this allegation.[12] In doing do, I find nothing to sustain the General Counsel's contention that Respondent began subjecting Joyce's work to close scrutiny. The report of her alleged errors was made by one of her fellow employees, in the same way that Joyce had complained within the prior week of Holliday's errors. Contrary to Joyce's testimony, Gossner did not specially mark the blister pack to catch her. I dismiss that allegation, too.

Finally, regarding Gossner's alleged threat to rid Respondent of Union advocates in 10 days, there is no way that the testimony of Joyce, Grace, and Copeland jibes. Two related that there were six people in the room; one remembered only two. Two recalled a discussion of a lottery. One made no mention of it. Two directly related the threat to the Union; one made no

[11] Wiener testified that he countered Joyce's accusation about Gossner's statement, noting that that was "a lottery ticket issue," which was a flagrant misstatement of fact. He was not a party to that conversation and, according to his own admission, learned of it only through "testimony here."

[12] To the extent that the Counsel for the General Counsel alleges in her brief that Joyce was constructively discharged, I note that the complaint does not allege a constructive discharge and Respondent was never placed on notice at the hearing that the General Counsel was so contending. By consequence, such an allegation was not fully or fairly litigated; and I will not find a violation based on this new theory. *Cibao Meat Products*, 338 NLRB No. 134 (2003).

reference to the Union or whom Gossner intended to get rid of. Gossner, as could be predicted, denied making the threat attributed to her; and her denial was adequately corroborated. Furthermore, I have difficulty understanding the reason that Gossner would have even made the threat which the three employees testified. Why would an antiunion employer delay firing employees for 10 days? I can think of no reason in the ordinary course of events, except here Joyce's last day of employment was April 18, precisely 10 days later. As seen above, she caused her own loss of a job, and this threat, I find, was carefully concocted, if ineptly carried out, to help Joyce in her Section 8(a)(3) case. I find no consistency or corroboration here, I find the alleged threat unreal, and I find Gossner and Respondent's corroborating witnesses credible. I dismiss this allegation.

The Objections

Having concluded that, between February 8 and April 5, 2002, the date of the stipulation agreeing to the second election and the date of that election, Respondent threatened employees with loss of their jobs in the event that the Union won the election, interrogated employees and shook the car of the principal Union supporters, and denied those supporters access to their fellow employees in order to ensure that the Union's position would not be disseminated. Joyce and Grace did not tell others of the events at the parking lot; but, if Gossner sung her little threat 50 times, as she admitted, it is probable that more than just Jackson and Wade and perhaps three to five others heard her. Finally, the history of Respondent's on-and-off refusal to permit Joyce and her sister access to the premises, depending on whether there was an election campaign, demonstrates that Respondent was attempting to stifle discussion of the Union. Its unfair labor practices thus affected all the employees, who were limited in their opportunities to listen to what Joyce and Grace had to say.

Only Gossner's threat (expanded by amendment at the hearing to include all 50 threats) was specifically alleged as objectionable conduct. Neither the parking lot incident nor the 10-minute rule were alleged as objectionable conduct; and Respondent contends that the Regional Director erred in permitting these to be considered as objectionable conduct, subsumed under the following allegation:

> During the critical period, acting through its agents, [Respondent] engaged in other acts of restraint, interference with and coercion of employees in the exercise of their Section 7 rights and/or engaged in other acts of objectionable conduct.

The Regional Director wrote in her notice of hearing:

> The Board has held that an election may be set aside on the basis of pre-election misconduct discovered by the Regional Director during the course of the investigation of Objections or unfair labor practice charges, even though such conduct was not specifically alleged in the Objections. *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139 (1988); *Burns International Security Services*, 256 NLRB 959 (1981); *Dayton Tire & Rubber*, 234 NLRB 504 (1978); *American Safety Equipment*, 234 NLRB 501 (1978) enf. denied on other grounds, 643 F.2d 693 (10th Cir. 1981); *Framed Picture Enterprise*, Inc., 303 NLRB 722 n. 1 (1991). The investigation disclosed evidence that [Respondent] engaged in the conduct set forth in paragraphs 5, 6(a), and 7(a) of the Complaint and Notice of Hearing referred to above.
>
> I find that this conduct, which was not specifically alleged as part of Objection 7 raises substantial and material issues of fact which can best be resolved on the basis of testimony taken at a hearing.

Respondent contends that the Regional Director erred in relying on *Burns International Security Services*, because, it contends, Board law permits consideration of conduct which was not alleged "only upon presentation of clear and convincing proof that [the misconduct is] not only newly discovered but also, previously unavailable." 256 NLRB at 960; *Rhone-Poulenc, Inc.*, 271 NLRB 1008, enfd. 789 F.2d 188 (3d Cir. 1986). However, the Regional Director recites that the Region's investigation of the unfair labor practice charges and the objections uncovered the objectionable conduct. That conduct is properly before the Regional Director. As the Board stated in *Burns*, 256 NLRB at 959:

> In *American Safety* [*Equipment Corp.*, 234 NLRB 501 (1978)], the Board restated its position with respect to a Regional Director's obligation in conducting investigations of timely filed objections. We held that it is within the Regional Director's discretion to determine the scope of the investigation but, "if he receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election." Here, the Acting Regional Director did not exercise his discretion to accept the late-filed objections, but felt constrained by the above-quoted language to consider them. Thus, he interpreted *American Safety* as establishing that the failure to file these objections within the time provided by the Board's Rules and Regulations can no longer serve as a basis for refusing to consider them. This is not what we intended. In *American Safety*, the Regional Director discovered unalleged misconduct in the course of his investigation and, sua sponte, properly set the election aside. Entertainment of a whole new set of objections, on the other hand, would vitiate our requirement that parties file timely objections. Being inundated with successive sets of objections, the Regional Director, if he had to investigate each new allegation, could be prevented from or unduly delayed in concluding his investigation.

The Union did not file piecemeal objections. There was no attempt to file late or supplemental objections, and the information relied on by the Regional Director was previously obtained during the investigation of unfair labor practice charges or the timely-filed objections. *Seneca Foods Corp.*, 244 NLRB 558, 558 fn. 3 (1979), in which the Board made no distinction between evidence obtained in an unfair labor practice investigation and evidence obtained in an investigation of objections. The objectionable conduct was, accordingly, before me.

Because Respondent's unfair labor practices affected all the employees, it follows that the objectionable conduct interfered with the free choice of employees in the election. *Metaldyne*

Corp., 339 NLRB No. 43, slip op. at 1 (2003); *Airstream, Inc.*, 304 NLRB 151, 152 (1991), appeal dismissed as moot 963 F.2d 373 (6th Cir. 1992); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962). Indeed, in an election which turned on the change of five votes, these unfair labor practices affected the results of the election. I, therefore, recommend that the election held on April 5 be set aside and that Case 4–RC–20185 be remanded to the Regional Director for appropriate action.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The unfair labor practices are neither so severe nor pervasive that they warrant any extraordinary remedies. The Union's request for such relief, such as the reading of the Notice to the employees at a meeting, is denied.

On these findings of fact and conclusions of law and on the entire record, including my consideration of the briefs submitted by all parties, I issue the following recommended[13]

ORDER

The Respondent Alandco Development Corp. d/b/a Senior Care at the Fountains, Pennsauken, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Shaking its employees' vehicles because it believes that the employees in the vehicles support or assist the United Food & Commercial Workers Union, Local 56, AFL-CIO (Union).

(b) Questioning its employees about their union activities.

(c) Directing vulgarities at its employees because they support the Union.

(d) Telling its employees that it will fire them if they vote for the Union.

e. Restricting its employees from entering its facility more than ten minutes before their scheduled starting time because they support the Union.

f. Telling its employees that it wants to terminate them because they support the Union.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Pennsauken, Pennsylvania copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 11, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 21, 2003

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT shake our employees' vehicles because we believe that the employees in the vehicles support or assist the United Food and Commercial Workers Union, Local 56, AFL–CIO (Union).

WE WILL NOT question our employees about their union activities.

WE WILL NOT direct vulgarities at our employees because they support the Union.

WE WILL NOT tell our employees that we will fire them if they vote for the Union.

WE WILL NOT restrict our employees from entering our facility more than 10 minutes before their scheduled starting time because they support the Union.

WE WILL NOT tell our employees that we want to terminate them because they support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ALANDCO DEVELOPMENT CORP. D/B/A SENIOR CARE AT THE FOUNTAIN

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."